FILED
JAN 4 1929

In the Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 565.

THE OKANOGAN, METHOW, SAN POILS (or SAN POIL), NESPELEM, COLVILLE, AND LAKE INDIAN TRIBES OR BANDS OF THE STATE OF WASHINGTON,

vs.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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The opinion of the court below in this case has not yet been officially reported.

The date of judgment of the court below in this case is April 16, 1928 (R. p. 66).

Petitioner's motion for rehearing was denied October 22, 1928 (R. p. 67).

Petitioners claimed below that Senate bill No. 3185, 69th Congress, First Session, entitled: "An Act authorizing certain Indian tribes and bands, or any of them, residing in the State of Washington, to present their claims to the Court of Claims," having been duly presented to the President for his consideration and not having been returned by him with his objections to the House in which it originated, as provided by Article 1, Section VII, Clause 2 of the Constitution of the United States, thereby became a law (R. pp. 6-7).

The court below held that this bill never became a law (R. p. 66).

The jurisdiction of this Court is invoked under the provisions of Chapter 229, Section 3 (b) of the Act approved February 13, 1925 (43 Stat. 939).

Attention is invited to the following cases, under which it is believed the writ prayed for should be granted:

Forsyth v. *Hammond* (166 U. S. 506; 41 L. ed. 1095)
Fields v. *United States* (205 U. S. 292; 51 L. ed. 807)
Hamilton Brown Shoe Co. v. *Wolf Bros. Co.* (240 U. S. 251; 60 L. ed. 629)
Magnum Import Company v. *Coty* (262 U. S. 159; 67 L. ed. 922)

STATEMENT OF THE CASE

Senate Bill No. 3185, 69th Congress, First Session, entitled: "An Act authorizing certain Indian tribes and bands, or any of them, residing in the State of Washington, to present their claims to the Court of Claims," having been duly passed by both Houses of Congress and having been duly signed and attested by the presiding officers thereof, was duly presented to the President for his consideration on June 24, 1926. On July 3, 1926 (eight days thereafter, Sundays excepted) the First Session of the 69th Congress adjourned for the summer recess. The President did not sign said bill, or file it with the Secretary of State without his signature, or return it with his objections to the House in which it originated within ten days (Sundays excepted) after it was so presented to him, or at any time thereafter.

Believing that said bill had thereby become a law, in accordance with the provisions of Article 1, Section VII, Clause 2 of the Constitution of the United States, petitioners duly filed their petition in the Court of Claims, as therein authorized. The defendant demurred to said petition, on the ground that said bill had never become a law. The court below sustained this demurrer and accordingly dismissed said petition (R. pp. 61-2, 66).

Petitioners' motion for rehearing was denied October 22, 1928 (R. pp. 66-7).

Whereupon, petitioners have prayed this Honorable Court that a writ of certiorari may issue to the Court of Claims to review its judgment herein (R. pp. 1-4).

ASSIGNMENT OF ERRORS

1. The court below erred in not giving proper consideration to the purpose, intent, and policy of the makers of the Constitution, in the light of contemporary history.

2. The court below erred in not giving proper consideration to the particular mischief this language was intended to prevent.

3. The court below erred in so construing the provision as to defeat its evident purpose, when the construction urged by petitioners is equally accordant with its words and sense and would enforce and protect such purpose.

4. The court below erred in not giving proper consideration to the subject, context, and the intention of the makers of the Constitution in construing this provision.

5. The court below erred in not giving due consideration to the obvious implication from the language of the constitutional provision that it was the President's duty to return the bill with his objections, if in any way reasonably possible to do so.

6. The court below erred in not holding that the adjournment intended by the Constitution was such an adjournment as would preclude all reasonable possibility of the return of the bill.

7. The court below erred in holding, in effect, that every adjournment of the Congress, whether temporary or final, would render it impossible for the President to return a bill with his objections.

8. The court below erred in not giving due consideration to the formal protests against the Presidential use of the "pocket veto" by the Judiciary Committees of the House and Senate.

9. The court below erred in the absence of decisions by this or other Federal courts in not giving due considera-

tion to the construction of identical or similar language in State constitutions by the highest courts of such States.

10. The court below erred in adopting a construction of the provision in conflict with and in derrogation of the right of Congress to adjourn and to pass this legislation, notwithstanding the Presidential "pocket veto."

11. The court below erred in holding that the adjournment of the First Session of the Congress prevented, that is, rendered impossible, the return of the bill by the President with his objections.

ARGUMENT

The question here is whether by the adjournment of the First Session of the 69th Congress the President was so prevented from returning the bill with his objections to the House in which it originated that said bill failed to become a law under the provisions of the last paragraph of Article 1, Section VII, Clause 2 of the Constitution of the United States, which reads as follows:

> "If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law."

It is respectfully submitted that the writ herein prayed for should be granted for the following reasons:

1. The question here involved is of great public interest and far-reaching importance.

The dignity and public importance of this question are of the highest character, as it relates to the exercise of functions bestowed by the Constitution upon the Legislative and Executive branches of our government, which are of the gravest importance to the people of the whole country. The enjoyment of our right to life, liberty and the pursuit of happiness is circumscribed and regulated by the laws passed by Congress. Consequently, any question growing

out of a conflict of authority between the President and the Congress, in regard to the enactment of a law, is of such great public importance as to fully justify the consideration of this Honorable Court.

For this reason, it is submitted that the petition should be granted.

2. This Court has not heretofore construed the words "by their adjournment prevent its return," in Article 1, Section VII, Clause 2 of the Constitution of the United States, and it is, therefore, still an open question before this Court as to whether the word "adjournment" therein refers to a final adjournment of the Congress; the adjournment of a session of the Congress, or to the adjournment of the Congress from day to day, or for longer periods, during a session.

The proper interpretation of the word "adjournment" in the language of the Constitution just quoted is of the greatest importance for the guidance of both the Congress and the President, in the consideration and adoption of our Federal laws, and it is respectfully suggested that it would therefore seem to be the constitutional prerogative of this Honorable Court to finally construe and define this word as so used in our Constitution.

For this reason, it is submitted that the petition should be granted.

3. This Court has not heretofore construed the words "by their adjournment prevent its return," in Article 1, Section VII, Clause 2 of the Constitution of the United States, and it is still, therefore, an open question before this Court as to whether the *sine die* "adjournment" of "the Congress," or the adjournment of a session or sitting thereof, or from day to day, or for a longer period of time during a session, "prevents" the return of a bill with the President's objections to the Congress under the quoted language of the Constitution.

It is of equal importance to the Congress and the President that they should have the benefit of the opinion of this

Honorable Court as to what particular character of adjournment of Congress, within the meaning of the constitutional language, will prevent the return by the President, with his objections, of a bill which has been duly passed.

The question here presented is, therefore, of great public importance and, for this reason, it is submitted that the petition should be granted.

4. This Court has not heretofore construed the words "10 days" as used in said quoted clause and it is still, therefore, an open question whether the "10 days" under contemplation are ten consecutive or legislative days (Sundays excepted). Therefore, this Court has not determined whether the return must be made within 10 calendar days and during a recess of the active legislative sittings of the Congress, or may be made within 10 legislative days and when the Congress has again resumed its active legislative sittings after the adjournment.

Great uncertainty has prevailed as to whether the 10 days (Sundays excepted) within which the President must return a bill with his objections, as provided by the language of the Constitution here in question, refers to calendar days or legislative days, and the opinion of this Honorable Court in construing this language will be of great assistance to both the Congress and the President in considering new legislation.

The question is, therefore, of great public importance and, for this reason, it is submitted the petition should be granted.

5. It would appear to be the constitutional duty of the President to afford Congress an opportunity to consider his objections to all bills passed by it, if possible for him to do so, before the final adjournment of any particular Congress, for the reason that Article 1, Section 1, of the Constitution has vested Congress with the exclusive power of legislation, and the President did not give Congress an opportunity to consider his objections to the legislation here in question, although this Congress did not terminate until March 4, 1927, and was in legislative session

for several months prior thereto, and the officers of both Houses thereof continued to perform their duties until said date, notwithstanding that the first legislative session of the Congress ended on July 3, 1926, by adjournment for summer recess.

It appears to be conceded that the Constitution vested the President with advisory power only, in regard to pending legislation. In his messages to Congress, he recommends such legislation as he thinks should be enacted for the best interests of the people of the country. When a bill is passed by both Houses of Congress, the Constitution requires that it be presented to the President for his consideration before becoming a law. If he agrees that the bill should become a law, the Constitution provides that he shall either sign it or allow it to become a law without his signature. If he does not approve such a bill, the purpose and policy of the Constitution seems to be that he shall return it with his objections, so that Congress may be advised of the reasons on account of which he regards the bill as objectionable and have the opportunity to concur with him or pass it over his objections.

In the light of this purpose and policy, it would appear to be the constitutional duty of the President to afford Congress an opportunity to consider his objections to any bill passed by it, if reasonably possible for him to do so before the final adjournment of the Congress so passing the bill. This seems to be in entire accord with the spirit and intention of Article 1, Section 1, of the Constitution, which vests Congress with exclusive power to legislate. The President did not give the Congress any opportunity to consider his objections to the legislation here in question, although this Congress continued until March 4, 1927, and was in legislative session for some three months prior thereto, while duly authorized representatives of the Senate continued in their places, ready to act during every business day until March 4, 1927.

Rule 32 of the Standing Rules of the Senate provides that:

"At the second or any subsequent session of a Congress the legislative business of the Senate which remained undetermined at the close of the next preceding session of that Congress shall be resumed and proceeded with in the same manner as if no adjournment of the Senate had taken place."

This rule clearly indicates that in the mind of the Senate such an adjournment as the one herein referred to did not in any way change the status of pending legislative matters, and the rule would seem to be sufficiently broad to include any bill which might have been presented to the President and returned by him with his objections for reconsideration.

In view of the foregoing, it would therefore appear that the President was not prevented from returning the bill referred to with his objections by the adjournment of the session which passed it and, therefore, for this reason, it is submitted that the petition should be granted.

6. The action of the President in the case at bar appears to be in conflict with the exercise by Congress, and to deprive Congress of its exclusive right to legislate under Article 1, Section 1, of the Constitution, as his action, if valid, amounts to an absolute veto by him of the legislation here in question, while this Congress was still in actual existence as a legislative body, and deprives the Congress of its constitutional right to repass the identical legislation by a two-thirds vote and thus make it a law notwithstanding the Executive objections.

The action of the President in this case seems to amount to an unwarranted interference with the exclusive power of Congress to legislate under Article 1, Section 1, of the Constitution, as it prevented the Congress from exercising its constitutional right under Article 1, Section VII, Clause 2, first paragraph, to consider his objection to this legislation and in its discretion to pass it over his objections by a two-thirds vote. This action on his part, if valid, constituted an absolute prohibition against this particular bill, which it is submitted is a power the makers of the Constitution did not intend to confer upon the President.

For this reason, therefore, it is submitted that the petition should be granted.

7. Because the question here involved necessitates the final determination of the line of demarkation between the Executive and Legislative branches of the government, as to the extent of the right of the Executive to negative any legislation, and the right of the Congress to reconsider legislation objected to by the Executive, it is believed that the case at bar should be determined by this Court as the Court of last resort.

The decision of this case must necessarily determine the line of demarkation between the power of Congress to legislate and the power of the President to negative such legislation.

The dignity and importance of the question involved in this case would seem to require its decision by the highest court of the land.

For this reason, therefore, it is submitted that the petition should be granted.

8. In view of the fact that Judiciary Committees of both Senate and House have at different times disagreed with the construction given this part of Article 1, Section VII, Clause 2, by some of the Presidents and their legal advisors, and that the highest courts of several of the States have construed identical or similar language in their State constitutions directly contrary to the construction sought to be reviewed, it is considered of the utmost importance that this provision should be construed by this Honorable Court.

The Judiciary Committees of the Senate and House, which are the legal advisors of these bodies, have at different times disagreed with the practical construction given to this part of Article 1, Section VII, Clause 2, of the Constitution, by some of the Presidents. While there appear to be no decisions of Federal courts on this question, except that herein sought to be reviewed, nevertheless the highest courts of several of the States have construed iden-

tical or similar language of the State constitutions directly contrary to the construction of the lower Court.

While these differences in construction do not constitute conflicting decisions by Federal courts, nevertheless, considering the quasi-judicial character of the opinions of the Judiciary Committees of the Senate and House, and the construction of identical or similar language by the highest courts of several of the States, when taken in connection with the construction of the constitutional language in question by various Presidents, there would seem to be such a conflict of opinion on this important question as would fully justify the final construction of the language of the Constitution here involved by this Honorable Court.

For this reason, therefore, it is submitted that the petition should be granted.

9. Because of the far-reaching importance of any judicial construction of the Constitution, it is believed that every question involving such construction should be finally determined by this Honorable Court as a Court of final resort thereon.

It is believed no argument is necessary to support this proposition and, for this reason also, it is submitted that the petition should be granted.

CONCLUSION.

In consideration of the views of this Honorable Court, concerning the issuance of writs of certiorari, as discussed in its opinions in—

Forsyth v. *Hammond* (166 U. S. 506; 41 L. ed. 1095)
Fields v. *United States* (205 U. S. 292; 51 L. ed. 807)
Hamilton Brown Shoe Co. v. *Wolf Bros. Co.* (240 U. S. 251; 60 L. ed. 629)
Magnum Import Company v. *Coty* (262 U. S. 159; 67 L. ed. 922)

and in view of the above reasons for allowing the writ, it is respectfully submitted that the petition for writ of certiorari to review the judgment of the court below should be granted.

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